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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 189

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

LaSalle National Bank, a national banking association, not personally but as Trustee under Trust Agreement dated December 28, 1954 and known as Trust No. 17365; Aaron B. Weiner; Mutual Properties Corporation, a corporation of Illinois; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; City of Chicago, a municipal corporation; Richard J. Daley, individually and as Mayor of the City of Chicago,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1. By virtue of the 1946 Amendment to 12(b) this Court resolved the confusion theretofore existing in the lower courts, and provided that on a motion to dismiss under ground (6), (failure to state a good claim) matters outside the pleading are not open for the court's consideration, unless the court shall elect to treat the motion as one for summary judgment, in which case all parties shall be given reasonable opportunity to present pertinent material and the motion shall be disposed of as provided in Rule 56.	10
2. Inasmuch as respondents concede that the complaint on its face states a good cause of action, the motion to dismiss should have been overruled because the zoning board "decision" set up in respondents'	

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affidavit was an affirmative defense and under 12(b) was not open to consideration on a motion to dismiss. Moreover, the order of the district court cannot be sustained as an order for summary judgment because the district court never elected to treat the motion as such, the district court order explicitly refers to the motion as one "to dismiss," and the affidavit did not conform to the requirements of Rule 56. 12

3. Of the two grounds assigned by the district court, the first, "lack of allegation of jurisdictional amount in controversy", is erroneous because the statutory amount appears both from the nature of the damage to respondents if relief be granted petitioner, and also from the amount of petitioner's claimed attorney's fees; the second ground, "res judicata," is erroneous because the state court decision, not passing on the merits but merely holding that petitioner had misconceived its remedy, is not a bar to the instant suit for a proper remedy. Respondents on appeal have abandoned both grounds and the appeals opinion indicates they were invalid. 15

4. In holding that there was no "issuable fact" to be tried, the appeals court was in error for several reasons. While petitioner admits that the zoning board entered a "decision" allowing a zoning variation, the factual contents of that "decision" are not in the record and are not admitted. Further, petitioner contends that it has a right to contest this "decision" as illegal and null and void, because the notice, hearing and deliberations were not in accord with the requirements of due process and the "decision" lacked the necessary statutory findings and was in excess of the board's statutory authority, all of which would present "issuable facts" to be tried before the application of any conclusions of law. 18

5. It was error for the appeals court to affirm the district court order on a ground not passed on by the district court, namely the zoning board "decision,"

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when that ground because of the limitations of 12(b) was not available for consideration by the district court and when the adversary would be taken by surprise. 21

6. The appeals opinion in holding that the zoning board "decision" allowing a variation, constitutes a conclusive bar to the proceeding was in error because, if, as petitioner contends, that "decision" were illegal and null and void, because of lack of due process in the notice, hearing and deliberations and lack of statutory findings and exceeding the board's statutory authority, then the "decision" could not be a bar to petitioner's statutorily conferred right to enjoint respondents' structure which admittedly is not in conformity with the existing zoning regulation. 22

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

222 East Chestnut Street Corporation, a corporation of Delaware, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on March 6, 1958.

(a) **Reference to the reports of the opinions delivered in the court below.**

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 253 F. 2d 484. Copy of the opinion is appended in **Appendix A** hereto.

The district court did not deliver any opinion.

(b) **Statement of the grounds on which the jurisdiction of the court is invoked.**

(i) The judgment of the Court of Appeals was entered on March 6, 1958 (**Appendix B**, p. 5a and certified record.) (ii) A petition for rehearing was filed by petitioner, and was denied by an order entered April 22, 1958 (**Appendix C**, p. 6a, and certified record.) (iii) The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari, is Title 28 U.S.C. sec. 1254(1).

(c) **The questions presented for review.**

(i) On a motion to dismiss by defendants, based on F.R.C.P. 12(b) "(6) *Failure to state a claim upon which relief can be granted*," is it proper for the district court to consider affidavits or other extraneous matter alleging an affirmative defense in bar?

(ii) If on a motion to dismiss it is not proper for the district court to consider affidavits or other extraneous matter alleging an affirmative defense in bar, is it proper for the appeals court to affirm the district court order of dismissal, not on the grounds set out therein, but on the ground of such affirmative defense, which had not been considered by the district court?

(Petitioner respectfully submits that if questions (i) and (ii) should be answered in the negative, then, in such event, this would be sufficient to dispose of this review because the appeals court order of affirmance would be clearly in error.)

(iii) Even if the averment of the affidavit here (that the zoning board decision had allowed a variation) were open to consideration on the present motion, should it be held as a matter of law that there can be no issue of fact when the contents of the board decision are not before the court either by copy or otherwise, and where, in addition, the petitioner may intend and has the right, to introduce evidence to show that such decision was illegal and null and void because of lack of proper notice, lack of sufficient statutory findings, lack of support in the record?

(iv) Even if on defendants' motion to dismiss it were proper to consider defendants' affidavit setting up that the zoning board had entered a decision allowing a variation, and that the state supreme court without consideration of the merits of the controversy, had decided that plaintiff—absent showing of special damage, lacked "standing" to bring statutory administrative review under the state statute—would this bar plaintiff from non-statutory review by the historic remedy of injunction?

(v) Even if on defendants' motion to dismiss it were proper to consider defendants' affidavit setting up that the zoning board had entered a decision allowing a variation, did the mere averment that such a board decision had been entered (particularly without any copy of the decision being exhibited)

constitute a conclusive bar to petitioner's cause of action here because of the alleged immunity of such board decision from judicial review on any ground either in this or any other court proceeding?

(vi) Where, as here, the effect of the appeals court decision is to determine the matter on the pleadings without any hearing on the merits, and it is by no means certain that under no possible theory, would petitioner be entitled to relief, does not this constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

(d) The statutes, ordinances or regulations which the case involves.

There are involved certain provisions of the Illinois Statutes (referred to as Ill. Rev. St. 1957). Ch. 24, Art. 73 is the enabling act under which municipalities are given power to zone; Art. 73-4 provides that "variations" from the zoning regulations may be allowed by city zoning board under certain conditions provided for therein; Art. 73-6.01 provides that all final administrative decisions of the zoning board shall be subject to judicial review under the Administrative Review Act; Art. 73-9 (as amended in 1953) provides that the proper local authorities of any municipality, and any owner or tenant of real property in the same contiguous zoning district, may institute any appropriate proceeding to prevent or abate a zoning violation. Ch. 110, sec. 264 *et seq.* is the Administrative Review Act adopted in 1945. Sec. 264 (sec. 1 of the Act) contains Definitions; sec. 265 (sec. 2 of the Act) prescribes the Scope of the Act. The provisions of the above statutes are set out verbatim in **Appendix D** hereto.

The ordinance involved

Municipal Code of Chicago, Ch. 194-A, Section 18(b)
"194 A-18 (Section 18) Building lines.

* * *

(b) No part of the ground area of any building in an Apartment House District shall be nearer to the front street line than a distance equal to 10 per cent of the average depth of all lots, pieces or parcels in such use district fronting in the block in which the building is located."

(c) Statement of the Case.

Complaint in equity by petitioner to enjoin respondents from erecting a multi-story apartment building-garage with its front line even with the street line and not complying with the applicable zoning regulation requiring an eleven foot set-back.

Petitioner, a corporation of Delaware, owns and operates a 19 story, 46 apartment building on E. Chestnut Street in Chicago, having a gross annual rental in excess of $125,000. Respondents, citizens of Illinois, own a parcel of land on Delaware Place, a neighboring street. The two parcels at their closest points are 185 feet apart and are in the same "contiguous zoning district" as defined and limited by the Chicago zoning regulations. The applicable zoning regulation provides for a front line set-back on Delaware Place of 10% of the lot depth (11 feet here) and prohibits any building within this 10% set-back. Respondents are about to erect a 23 story combination apartment and garage which will extend to the front line of Delaware Place and thereby violate this 10% set-back regulation; this violation, petitioner avers, will cause petitioner substantial damage in an amount, exclusive of interest and costs, in excess of $3,000.

After these averments, the complaint pleads the state statute, Ill. Rev. St. (1957) Ch. 24, 73-9 (as amended in 1953) **(Appendix D)** conferring on any property owner in the same contiguous zoning district, the right to sue to prevent a zoning violation, and prays for a permanent injunction against the violation, and for an allowance of attorney's fees ($25,000 prayed) as authorized by this statute.

Respondents filed a Motion to Dismiss in which they alleged (1) lack of jurisdictional amount, (2) res judicata because of a previous state court decision, (3) the state statute 73-9 does not, as a matter of law, grant to petitioner the right to bring such action. Annexed to respondents' Motion to Dismiss was the affidavit of Abner J. Mikva (one of the respondents' attorneys) averring that respondents' original application for a building permit had been denied by the Chicago Building Commissioner because the zoning regulation required such buildings be set back from the front line 10%, in this case 11 feet; that respondents, pursuant to another section of the state statute, namely 73-4, had thereupon applied to the Chicago Zoning Board of Appeals to allow a variation from the 10% front set-back regulation; that the board after hearings, attended by petitioner's counsel, had entered a decision allowing such variation;[1] that petitioner thereupon appealed from the board decision to the state superior court; that the state superior court entered a judgment affirming the board decision and dismissing the

[1] No copy of the board decision or quotation therefrom was exhibited; nothing but the short conclusory statement (app. 15): "4. Following the decision of the zoning Board of Appeals granting the variation sought by these defendants . . ."

complaint[2]; that petitioner thereupon appealed to the state supreme court which affirmed (1956) 10 Ill. 2d 132.[3]

The instant case was taken by the district court on the complaint, the motion to dismiss and the briefs of counsel. Subsequently without hearing oral argument and without delivering any opinion, the district court entered an order sustaining the motion to dismiss on two grounds, lack of sufficient averments as to jurisdiction and res judicata.[4]

On appeal, the appeals court affirmed on a new ground not considered or passed on by the district court, namely that the averment in respondents' affidavit that the zoning

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[2] No copy of the state superior court judgment or quotation therefrom was exhibited; nothing but the short conclusory statement (app. 16) "the court entered an order affirming the decision of the zoning board of appeals and dismissing plaintiff's complaint . . ."

[3] The state supreme court opinion, 10 Ill. 2d 132 referred (p. 134) to the issues on the merits ". . . that insufficient notice was given of the application and the hearing thereon; that the amendatory act of 1955 . . . is unconstitutional in several respects; that the decision of the board failed to contain sufficient findings of fact as required by the statute; that the decision of the board is not supported by the record . . ." The court there sustained defendants' point that plaintiff, absent any showing of special damage, lacked "standing" to maintain an action under the State Administrative Review Act and affirmed on this ground alone, without any consideration of the merits of the controversy: (p. 136) "In view of such conclusions the constitutional and other contentions made by plaintiff, although argued extensively, need not be considered. The judgment of the superior court dismissing the action was correct and is hereby affirmed."

[4] The order reads (app. 2):

"Upon due consideration the court being fully advised, it is Ordered that the instant complaint be and the same hereby is dismissed for failing to sufficiently allege therein wherein this Court has jurisdiction and, in any event, since the matter complained of is barred by res judicata." The reference to jurisdiction is undoubtedly to the statutory "amount in controversy," U.S.C. Tit. 28, Sec. 1332(a).

board had entered a decision allowing a variation from the front set-back regulation, constituted an absolute bar to petitioner's suit; the opinion gave no consideration to petitioner's points (i) that such an affidavit was not available on a motion to dismiss, (ii) that the contents of the board decision were not shown by copy or otherwise, (iii) that the board decision was not final and conclusive, but was open to review for failure of due process, failure to comply with the enabling statute, exceeding statutory authority, etc.; (iv) that petitioner having been denied a right of administrative review in the state court because of lack of "standing", arising from absence of showing of special damage, had a right to invoke the historic non-statutory remedy of review by suit for injunction. The appeals opinion indicates that it does not agree with the grounds on which the district court sustained respondents' motion, the opinion reading:

> (p. 4): "The plaintiff contends that the District Court erred when it held, as it did, that it was without jurisdiction and that the injunction proceedings in the Superior Court of Cook County . . . barred the action below by *res judicata*. What we have heretofore said is dispositive of this appeal and although the reasons stated by the District Court for dismissal may be valid[5] necessity for further discussion is thus obviated."

The appeals opinion contains some language which, petitioner respectfully submits, is factually erroneous:

> (p. 2) "In oral argument before this court the plaintiff conceded that the Zoning Board of Appeals did grant the variance and that the Superior Court of Cook County affirmed on review and that order and judgment are in full force and effect."

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[5] This seems to be an error for "invalid".

This is not a correct statement of petitioner's position. Petitioner, on oral argument conceded that the board did enter *a decision* granting a variance, but did *not* concede that said order is in full force and effect. Petitioner contended that (i) said board decision was an affirmative defense and as such was not open to consideration on a motion to dismiss for failure to state a cause of action, (ii) further, said decision was not open to consideration here because the language thereof was not before the court, no copy of it having been exhibited by defendants; (iii) even if otherwise open to consideration, said decision was illegal and null and void because in excess of the statutory authority of said board, as would appear if a copy of the decision had been presented.

The basis for federal jurisdiction in the district court was diversity of citizenship and the existence of an amount in controversy in excess of $3,000, interest and costs.

Argument.

1. Notwithstanding the fact that the Advisory Committee and this Court had intended by the 1946 Amendment to 12(b) to resolve the previously existing confusion, there still seems to be uncertainty in the courts as to whether on a motion to dismiss, matters outside the pleading are open for the court's consideration. It is important that this Court take the present petition and reaffirm the doctrine of the amendment, namely that as long as the motion continues to be "to dismiss," matters outside the pleading are not available.

The Rules provide (8(a)) that the complaint is to contain . . . "(2) A short and plain statement of the claim showing that the pleader is entitled to relief." Affirmative defenses are to be set forth affirmatively (9(c)): "In pleading . . . a party shall set forth affirmatively accord and satisfaction . . . estoppel, . . . res judicata, . . . and any other matter constituting an avoidance or affirmative defense." Rule 12(b) provides that every defense "shall be asserted in the responsive pleading thereto if one is required" except that the following defenses may, at the option of the pleader, be made by motion: ". . . (6) failure to state a claim upon which relief can be granted."

Prior to the 1946 amendment (adopted December 27, 1946, effective March 19, 1948) there was a division of authority in the different courts on permitting affidavits to be used in support of defense (6), as a result whereof the Advisory Committee and this Court "resolved the confusion," to quote Moore's Federal Practice, 2d Edition, Vol. 2, pp. 2255 *et seq.*) by the addition of the following sentence to Rule 12(b):

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material* made pertinent to such a motion by Rule 56." (emphasis supplied)

The author continues (p. 2256) by pointing out that such a presentation of extraneous matter requires the trial court to make an election: (1) he may disregard the extraneous matter and consider and dispose of the motion as a *motion to dismiss*, in which case plaintiff has no right to file any opposing affidavit because defendant's affidavit is not available for consideration, or (2) he may *convert* the motion into one for *summary judgment*, thereby making defendant's affidavit available for consideration, but in such case, the plaintiff "*shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*" The author (p. 2256) footnote 23, quotes from the Advisory Committee Note, section 1201(7) *supra*.

> "It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavit and extraneous proofs to *avoid taking a party by surprise* through the conversion of the motion into a motion for summary judgment." (emphasis supplied)

See also *Cyclopedia of Federal Procedure, Third Edition*, (Callaghan & Company) *vol. 3; D. Proof and Matters Considered on Motion.* 2. Affidavits and Other Matters Outside Pleading.

a. On Motion Presenting Failure to State Redressable Claim. § 45.181, *Generally*, § 15.182, *Former Conflict*, § 15.183, *Treating motion as for summary judgment.*

b. On Motion Presenting Specific Affirmative Defenses, § 15.189, *Generally*, § 15.190, *Former Conflict.*

As will be seen below, the appeals court opinion gives no consideration to this language and to the policy of 12(b) as so amended.

2. It was error for the district court to sustain respondents' motion to dismiss.

(a) Respondents do not contend that the complaint here does not state a good cause of action.

The complaint alleges that petitioner's parcel and respondents' parcel, are located in the same contiguous zoning district; that the applicable zoning regulation prohibits any building within the front 10% (11 feet) of respondents' parcel; that respondents are about to build to the street line, that the state statute 73-9 (as amended in 1953) has conferred a right on petitioner as a qualified property owner to sue to prevent such violation and, if successful, to recover attorney's fees; that petitioner's damage will be in excess of $3,000, its attorney's fees will be $25,000; that there is diversity of citizenship and an amount in controversy in excess of $3,000; the prayer is for declaratory judgment, permanent injunction and allowance of attorney's fees. Respondents make no contention but that the complaint is good *on its face.*

(b) **On a motion to dismiss a complaint for defense "(6) failure to state a claim upon which relief can be granted" (F.R.C.P. 12(b)), the complaint must be judged on its face, and affidavits and other extraneous matters setting up an affirmative defense in bar are not open for the court's consideration.**

The appeals opinion holds that the zoning board decision purportedly allowing a zoning variation (and set up as an affirmative defense in respondents' supporting affidavit) is available for consideration on the motion to dismiss. Petitioner submits the basic error in the opinion is the failure of the court to realize that the sufficiency of the complaint must be judged on the complaint, *as a complaint,* and that an affidavit setting up an affirmative defense in bar is not open to consideration. The holding of the opinion is thereby in conflict with the policy of this Court as reflected in the 1946 amendment to 12(b).

(c) **The zoning board decision set up in respondents' affidavit was clearly an affirmative defense and was not open to consideration on the Motion to Dismiss.**

The complaint pleaded the zoning regulation 18(b) prohibiting building within the front 10% of the lot. Respondents' affidavit admits the regulation and that because thereof the building commissioner denied respondents a building permit. The affidavit then goes on, in confession and avoidance, to allege that subsequently thereto the zoning board entered a decision allowing respondents a "variation" from this regulation. Obviously this was an affirmative defense and respondents should have set it up by answer, not by motion to dismiss; any other holding is in disregard of the plain language of the 1946 amendment to 12(b).

(d) The order of the district court cannot be sustained on the basis of a motion for summary judgment.

As noted, Rule 12(b) as amended in 1946, now provides that if on a motion to dismiss for failure to state a cause of action (6), "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, . . ." But the district court's order here cannot be sustained on that ground for two reasons:

(i) In order for the motion to be treated as one for summary judgment, it is necessary under the amendment to 12(b) that the *district court so elect*, and that the adverse parties "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." There is nothing in the record here that the district court ever elected to treat this motion as one for summary judgment, or, much less, that petitioner was notified of such election and given an opportunity to file counter-affidavit. In fact, the district court's order explicitly states that the court was passing on *the motion to dismiss* (app. 2).

Sarco v. *McGrath*, D.C. Cir. 1952, 196 F. 2d 20, 23

> "(6) We think the emphasis in summary judgment practice has been, and must continue to be, on actual notice. This is made clear not only by Rule 56 itself but also by Rule 12(b), which expressly provides that when extra-pleading matters are presented, 'all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' Without such notice that allegations of fact are being made for the record, there is no real opportunity to create the 'genuine issue of material fact' which can stave off summary judgment." Reversed.

Bowdidge v. *Lehman*, 6 Cir. 1958, 252 F. 2d 366, pp. 368-369. "However, Rule 56 (c) provides that a motion for summary judgment requires service 'at least ten days before the time fixed for hearing'. We think the spirit of the rule requires the same notice and hearing where this court contemplates summary dismissal on its own motion. Since attorney for appellant was given neither notice nor opportunity to be heard upon the question of summary dismissal the judgment was erroneous." Reversed.

(ii) But even if the district court had elected to treat the motion as one for summary judgment, there was no proper showing here of the contents of the zoning board decision or of the lower court judgment under Rule 56(e) because the affidavit did not contain "sworn or certified copies" thereof as required by that rule.

3. (a) The district court assigned only two grounds in support of his order sustaining the motion to dismiss, namely 1st, lack of jurisdiction, 2d res judicata. (See order quoted above, p. 7 footnote 4 app. 2).

(b) Neither of these grounds was a proper basis of a motion to dismiss here.

1st, **Lack of jurisdictional amount was not a basis for dismissal.** The complaint alleged that petitioner's building had a gross annual rental in excess of $125,000, (comp. 3(c) app. 4); that respondents' proposed building would be 23 stories high containing 150 apartments and 85 garage stalls (comp. 9, app. 6-7); that the zoning violation would cause petitioner damage in excess of the sum of $3,000 (comp. 9, app. 7-8). Irrespective of the amount of petitioner's damage, it is obvious that if petitioner prevailed, the result would be to prevent respondents from using the front 11 feet of their land for a height of 23 stories and would cause them damage far in excess of $3,000.

In a suit to prevent a defendant from erecting a described structure, the court in determining whether matter in controversy exists in the jurisdictional amount, will not only consider the value of plaintiff's right and the damage to plaintiff if the relief prayed *be not* granted, but will also consider the value of defendant's proposed structure and the damage to defendant if the relief prayed *be* granted; if either of these damages, whether to plaintiff or to defendant, is in the jurisdictional amount, that is sufficient to confer jurisdiction.

U.S.C. Title 28, sec. 1332(a).

American Smelting & Refining Co. v. *Godfrey*, 158 Fed. 225, 228-229, 8 Cir. 1907 (cert. den. 207 U.S. 597).

Fidler v. *Roberts*, 41 F. 2d 305, 306, 7 Cir. 1930.

Ronzio v. *Denver & R.G. W.R. Co.*, 116 F. 2d 604 10 Cir. 1940.

But there is more: Under the state statute, Ch. 24, 73-9 **(Appendix D)** plaintiff, if successful, is entitled to recover a reasonable attorney's fee, which plaintiff (comp. par. 17(c), app. 9-10) alleges would be $25,000. Such right to attorney's fees is a substantive right which alone may sufficiently constitute the jurisdictional amount in controversy.

Missouri State Life Insurance Company v. *Jones*, 290 U.S. 199, 200-201, 201-202.

People of Sioux County, Nebraska v. *National Surety Company*, 276 U.S. 238, 241-242, 243-244.

2d **Res judicata was not a proper basis for dismissal.** The state supreme court in *222 East Chestnut Street Corporation* v. *LaSalle National Bank*, 1956, 10 Ill. 2d 132,

decided that petitioner, absent showing of special damage lacked "standing" to bring review under the state administrative review statute (Ill. Rev. St. 1957, Ch. 110, sec. 264) and on that ground alone without any consideration of the merits, affirmed the lower state court judgment which had dismissed petitioner's suit for state court administrative review. This holding of the state supreme court of petitioner's lack of standing to appeal necessarily decided that petitioner lacked standing to bring the suit at all and the court so held.[6] It is settled law that a decision holding that a party has misconceived his remedy but not passing on the merits, is no bar to a second suit by that party for a proper remedy:

Hughes v. *United States*, 71 U.S. (4 Wall) 232.

Barnsdall v. *Wallemeyer*, 142 Fed. 415, 8 Cir. 1905.

Bistline v. *United States*, 229 Fed. 546, 549, 9 Cir. 1916.

Orminski v. *Hyland Electric Supply Company*, 326 Ill. App. 392, 395-397 (1945).

30 Am. Jur. 946 Judgments, sec. 210, Misconception of Remedy.

18 Am. Jur., Election of Remedies, p. 133, sec. 10, choice of remedies; p. 146, sec. 24, Mistake as to remedy.

American Law Institute, Restatement of Law of Judgments, p. 193, sec. 49; p. 271, sec. 65; p. 272, sec. 65; p. 276, sec. 65.

It follows, therefore, that the fact that petitioner filed suit in the state court for statutory administrative review

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[6] 10 Ill. 2d 136: "The judgment of the superior court dismissing the action was correct and is hereby affirmed."

of a zoning board decision which it regarded as illegal and null and void, and was denied relief in that forum because it had misconceived its remedy, does not act as a bar to a second suit in the federal courts for non-statutory review of this allegedly illegal agency decision, by complaint for injunction.

Petitioner believer that this point does not need any further exposition because the appeals court has indicated as noted, that it agrees with petitioner that the reasons given by the district court in its order of dismissal were erroneous.

4. The appeals opinion is in error in holding that there is no issuable fact to be tried.

Independently of petitioner's objection that the board decision is an affirmative defense which under the Rules must be raised, not by motion to dismiss but by answer, petitioner contends that even if a copy of the board decision allowing a variance had been exhibited with the affidavit and were part of the record, the decision would not necessarily be a conclusive bar to this proceeding because petitioner would have the right to attack the decision as illegal and null and void, for a variety of reasons, *e.g.* that evidence had been considered that was not presented at open hearing; that the agency had exceeded its statutory authority; that the agency had failed to make the statutory findings; that there was no basis in the record for the findings; that there had been a denial of due process. Each of these objections would or certainly might present an issue of fact, requiring a hearing by the trial court. The state statute (Ill. Rev. St. 1957, Ch. 24, Art. 73-4) sharply restricts the power of the board to grant variations; there must be evidence "that (1) the property . . . cannot yield a reasonable return if permitted to be used only under the

conditions allowed by the regulations . . .; and (2) the plight of the owner is due to unique circumstances; and (3) the variation . . . will not alter the essential character of the locality" (Art. 73-4(a)). Further every variation ". . . shall be accompanied by findings of facts . . . specifying the reason . . . for making the variation" (Art. 73-4(g)) For lack of such findings, the state supreme court has summarily reversed, *Lindburg* v. *Zoning Board*, 8 Ill. 2d 254, 256. See 10, Ill 2d 132, at 134, quoted above, where the state supreme court notes some of the grounds on which the board decision had been attacked here.

A fortiori, is there an issuable fact to be tried where, as here, no copy of, or quotation from, the board decision is exhibited, only a brief conclusory statement of its substance,

> "4. Following the decision of the Zoning Boa d of Appeals granting the variation sought by these defendants . . . (app 15)"

Under any theory of the case, the legal effect of the board decision would depend upon the wording of the decision, and it would seem impossible for a court to evaluate the decision *as a matter of law*, when the contents of the decision *as a matter of fact* were not before the court. To mention only one point, how can the appeals court, *absent the fact* of a copy of the board decision conclude as *a matter of law*, that the decision satisfied the above statutory requirement of 73-4 as to the necessary findings of fact on (1) (2) and (3), which findings the statute makes a condition precedent to the allowance of any variation?

The one authority cited by the opinion (p. 4) *Farrall* v. *District of Columbia Athletic Union*, D.C. Cir., 1946, 153 F 2d 647, does not support the court's reasoning. In *Farrall* the holding was that there were possible issues of

fact and the judgment of the district court sustaining a motion to dismiss was reversed. There is another reason why *Farrall* is not persuasive in the issues here; that case was decided in 1946 (before the effective date, March 19, 1948, of the 1946 amendment to 12(b)) when there was still "confusion" among the courts on the effect of 12(b) and before this Court had "resolved the confusion" by adopting the amendment.

There are many cases which hold that a motion to dismiss is not to be sustained unless the court can say that on the facts alleged, that plaintiff under no possible theory could recover; *c.f. Topping* v. *Fry*, 7 Cir. 1945, 147 F. 2d 775, judgment reversed; *Chicago & Northwestern Railway Co.* v. *Chicago Packaged Fuel Co.*, 7 Cir. 1950, 183 F. 2d 630, judgment reversed; *Roemhild* v. *Jones*, 8 Cir. 1957, 239 F. 2d 492, judgment reversed. Petitioner points out that respondents confess non-compliance with 18(b), the applicable zoning regulation, but seek to avoid the effect of such non-compliance by means of the board decision purporting to allow a "variation." Petitioner contends that whether such board decision affords respondents the protection they claim, is a mixed question of *fact* (depending upon the wording of the decision, the notice given, the evidence presented at the hearings, the matters considered outside the hearings, etc.) and of *law* (the application to the record of the state statutes and the constitutions of the state and of the United States) and that it is error for a court to hold, as the appeals court has held here, that petitioner "under no possible theory could recover."

5. The appeals opinion, in stating that it could disregard the grounds given by the lower court for its order, ((a) lack of jurisdictional amount and (b) res judicata) and affirm on another ground not passed on by the lower court (the affirmative defense of the zoning board decision)—overlooks the condition of the pleadings and the principle of appellate review that appellate affirmance on another ground is not proper (a) where the other ground is such that the lower court could not properly have acted on it, or (b) where the adversary would be taken by surprise.

As noted, the opinion after indicating that the reasons given by the district court in its order sustaining the motion to dismiss, were not valid, states that the order must be affirmed on another ground, the unassailability of the zoning board decision allowing the variation.

Petitioner recognizes that there is a general rule of appellate review that if the appellate court concludes that the lower court's order is correct, although based on wrong reasons, the order will be affirmed. There are, however, two important qualifications to the rule which prevent its application here: *1st, the ground assigned by the appellate court for affirmance must be one that was available to the lower court;* if for any reason, whether of pleading or otherwise, it would have been improper for the lower court to base its decision on a specified ground, it is equally improper for the appellate court to affirm on that same ground. In the instant case, it would have been improper, under 12(b) as now worded, for the lower court to base an order of dismissal on the extraneous matter in the affidavit; likewise, for the same reason it is improper for the appeals court to base its order of affirmance on this same extraneous matter. *2d. The ground assigned by the appeals court must not take the adversary by surprise;*

if it does, the adversary should be given an opportunity to establish in the trial court additional facts which would affect the result. *Helvering* v. *Gowran*, (1937) 302 U.S. 238, 245. The appeals court here, if it were to allow consideration of the affidavit in seeming disregard of 12(b) and in spite of the fact that the district court did not consider the affidavit—should at the very least have given petitioner, taken by surprise on this change of theory, an opportunity to have met the affidavit by counter-affidavit.

6. The appeals opinion is in error in holding that the zoning board decision, allowing a variation, constitutes a conclusive bar to this proceeding.

Petitioner, as noted, contends that the issue of the effect of the zoning board decision allowing a variation, is not properly open for consideration on the present pleadings, and that if respondents wish to set this up as an affirmative defense in bar, they should do so by answer as the Rules provide. But petitioner further contends that even if this decision, so far as pleaded here, were open for consideration, that the decision would still be subject to judicial review and would not of itself constitute a conclusive bar to this proceeding.

The opinion recognizes that the state legislature by the 1953 amendment to 73-9, conferred on neighboring property owners (without any condition precedent of special damage) the substantive right to institute on their own initiative, proceedings to prevent or abate any construction in violation of the zoning regulations, and that petitioner's complaint states a good cause of action under the state statute. But, the opinion reasons, it affirmatively appears from the affidavit that the zoning board allowed respondents *a variation* from this regulation, and therefore, there is no violation of the regulation because the

regulation has been "varied" for the particular property. Petitioner replies that (in addition to the objections that such an affirmative defense must be set up, not by motion to dismiss, but by answer) the fact that the zoning board has ordered a zoning variation is not conclusive here; that the zoning board decision may be and petitioner contends is, illegal and null and void for lack of proper notice, lack of evidence in the record to support the decision, consideration by the agency of matters outside the record,[7] lack of proper findings—as would appear if the decision were pleaded by answer and a hearing had on it.[8] But the opinion says petitioner is not entitled to such a hearing because the state statute (Ch. 110, sec. 265) provides for a statutory administrative review of such decisions, provides further than such statutory review shall be the only review and petitioner having instituted proceedings for statutory administrative review and being denied relief, has therefore no further remedy. The opinion reasons that 73-9 must be construed with the rest of 73, and that, therefore, the denial of statutory administrative review here shows a legislative policy to preclude any other review. The opinion overlooks that under fundamental principles of statutory construction, if there is any conflict between the two sections, ch. 110, sec. 265 and ch. 24, art. 73-9, it is 73-9 which must prevail because it is the *later* in time. Ch. 110, sec. 265 was adopted in 1945 and 73-9 as now worded, was amended *in 1953*, some 8 years after

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[7] See **U.S. v. Abilene & So. Ry. Co.** (1923) 265 U.S. 274, 289-290, where the Court affirmed a permanent injunction against an agency order because the agency had considered matters not in evidence.

[8] As noted, no copy of or quotation from, the zoning board decision was exhibited here, only a brief conclusory statement of its substance. "4. Following the decision of the Zoning Board of Appeals granting the variation sought by these defendants . . . (app 15)"

1945. At all times prior to the 1953 amendment the neighboring property owner could have brought an action to prevent a zoning violation if he showed "special damage" and the necessary and *only* effect of the 1953 amendment was to *change the existing law* and to confer on the neighboring property owner, who could theretofore sue *only* on showing of special damage, the right now to sue *without* any showing of special damage. Under this seemingly obvious construction of the 1953 amendment to 73-9, it would follow that the *earlier* provisions of ch. 110, sec. 265, (that in order to bring administrative review, the plaintiff must make showing of special damage, and that only by statutory administrative review can an agency decision be reviewed) would have no application here because otherwise the 1953 amendment *to* 73-9 would be meaningless. If under the 1953 amendment to 73-9, the neighboring property owner must *still* make a showing of special damage, then the amendment accomplishes nothing because that was the status of the law *before;* and if under the 1953 amendment, the plaintiff cannot bring suit for injunction where he has been denied statutory administrative review because of lack of showing of special damage, then again the 1953 amendment is meaningless.

The opinion states that the petitioner cannot sue here to enjoin a zoning violation because there is no zoning violation. And why is there no zoning violation? Because, the opinion says, the zoning board—differing from the building commissioner—has so decided. But this is begging the question; the zoning board is not a court of last resort and its decision, petitioner contends, was illegal and null and void because there was lack of proper notice, lack of statutory findings, lack of support in the record, consideration of matters outside of the record. No matter, the

opinion says, petitioner is still barred because the board decision must stand until it is set aside by statutory administrative review, and petitioner is not allowed to bring statutory review because petitioner has made no showing of special damage. Such a holding, petitioner respectfully submits, would lead to a *reductio ad absurdum*. However flagrant a situation might be disclosed, however biased or even corrupt the board might be, whatever the violation of due process in the notice, hearing and determination—once the board has decided, the decision becomes final and immune from attack by the neighboring property owners, absent showing of special damage, and the 1953 amendment to 73-9 is impotent and ineffective! The opinion has erroneously construed ch. 24, 73-9 as being dependent upon ch. 110, sec. 265, instead of recognizing that 73-9, as amended in 1953, embodies *a distinct change of legislative policy* and that if there were any conflict between 73-9 and 110-265, then 73-9 as the later in time should prevail.

When the legislature in 1953 amended 73-9 by providing that thereafter a neighboring property owner could as such (*without any showing of special damage*) bring suit to enjoin a violation, the legislature intended to *expand* the rights theretofore in force, and to allow such property owner to bring suit for injunction without first seeking administrative review, because to require him to seek administrative review, when, absent special damage, he had no standing to bring such action, would be to confer a *right* under the amendment to 73-9 and at the same time *deny any remedy*. It is unreasonable to impute to the legislature the intention to confer a right and at the same time the intention to deny any remedy to enforce it. Yet this is the holding of the opinion here.

The opinion has also failed to recognize the fundamental principle of law that if for any reason *statutory* administrative review is unavailable or inadequate, the party may have recourse to *non-statutory* review by injunction; that an administrative decision which goes beyond the agency's power and is not in conformity with the enabling statute, is illegal and null and void; see U.S.C.A. Title 5, Sec. 1009, Administrative Procedure Act of 1946, which section "does not change the existing law but is declaratory of that law as it always has been." *Atchison T. & S. F. Rwy. Co.* v. *U. S.*, D.C. Mo. 1955, 130 F. Supp. 76 affirmed 350 U. S. 892, rehearing denied 350 U. S. 943.

Conclusion.

Petitioner submits that the opinion, in allowing extraneous matter to be considered on a motion to dismiss, is in conflict with the plain language of F.R.C.P. 12(b) as amended by this Court in December, 1946; that if the opinion be allowed to stand it will tend to bring back the "confusion" as to the meaning of this Rule, which the amendment of 1946 was intended to resolve; that it is important from the standpoint of efficient and uniform judicial administration that this Court hand down a decision that the 1946 amendment means what it says, namely, matters outside the pleading cannot be considered on a motion to dismiss.

Petitioner submits further that petitioner has a state-conferred substantive right to enjoin or abate any zoning violation in its immediate neighborhood; that if a city zoning board attempts to legalize what would otherwise

be a violation, the decision of that board cannot become final and conclusive merely because a state court holds that petitioner lacks "standing" to bring the state statutory administrative review, but that petitioner, in enforcement of his statutorily created substantive right, can have a non-statutory review of the agency decision by invoking the ancient remedy of a suit for injunctive relief, and that the federal courts are historically a proper forum for such an action by petitioner.

Petitioner submits that the proceedings in this case call for an exercise of this Court's power of supervision.

Petitioner prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

JOSEPH F. ELWARD,
Attorney for petitioner.

APPENDIX A.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12144 SEPTEMBER TERM 1957 - JANUARY SESSION 1958

222 EAST CHESTNUT STREET CORPORATION, a corporation of Delaware,

Plaintiff-Appellant,

v.

LASALLE NATIONAL BANK, a national banking association, not personally, but as Trustee under Trust Agreement dated December 28, 1954, and known as Trust No. 17365; AARON B. WEINER, Mutual Properties Corporation, a corporation of Illinois; GEORGE L. RAMSEY, individually and as Commissioner of Buildings of the City of Chicago; CITY OF CHICAGO, a municipal corporation; RICHARD J. DALEY, individually and as Mayor of the City of Chicago,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 6, 1958

Before FINNEGAN, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* Plaintiff, in the District Court, sought to enjoin the defendants LaSalle National

Bank, Trustee, Aaron B. Weiner and Mutual Properties Corporation from erecting or attempting to erect a combination apartment building and garage on the defendant Bank's property nearer to the south front street line of East Delaware Place than 11 feet and the defendants City of Chicago and George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago, from issuing a permit therefor. It also sought a declaratory judgment construing the Chicago Zoning Ordinance and particularly §18(b) thereof as meaning and providing that the location of said building nearer to the south front street line of East Delaware Place than 11 feet would be a violation of said §18(b) and would be illegal. It further prays for an abatement of any such violation.

The plaintiff premises its right to maintain this action solely on Ill. Rev. Stat., 1955, c. 24, §73-9. It alleges that the proposed construction is in violation of §18(b) of the Chicago Zoning Ordinance in that the front line of the building will be even with or upon the front street line of the lot whereas §18(b) would, in this case, require a set back of eleven feet.

The defendants filed a motion to dismiss supported by affidavit stating that the Zoning Board of Appeals of the City of Chicago granted a variation permitting the proposed building to be erected on the front lot line; that the plaintiff herein filed an action in the Superior Court of Cook County seeking review of the order of the Zoning Board of Appeals granting the variance pursuant to the Illinois Administrative Review Act; that the Superior Court of Cook County entered judgment affirming the decision of the Zoning Board of Appeals and dismissing plaintiff's complaint; that an appeal therefrom was taken to the Illinois Supreme Court where the judgment was affirmed. 222 *East Chestnut Street Corporation* v. *The Board of Appeals of the City of Chicago, et al.*, 1956, 10 Ill. 2d 132, 139 N.E. 2d 221.

The District Court granted the motion of the defendants to dismiss. Judgment was entered accordingly. This appeal followed.

In oral argument before this court the plaintiff conceded that the Zoning Board of Appeals did grant the variance and that the Superior Court of Cook County affirmed on review and that order and judgment are in full force and effect.

The plaintiff has completely misconstrued §73-9 of the Illinois Zoning Act. This section, by its very terms, must be read in conjunction with the other sections of the Act. Section 73-4 confers on the Board of Appeals the right to grant a specific variance in the Zoning Ordinance and §73-6.01 provides for judicial review pursuant to the Administrative Review Act.

The Administrative Review Act, Ill. Rev. Stat., 1955, c. 110 §265 provides as follows:

> "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof."

Thus there is only one method of judicial review of the Zoning Board of Appeals' decision granting a variance. The plaintiff attempted, by the statutory judicial review procedure, to set aside the order granting the variance and was unsuccessful. The variance granted is, therefore, in full force and effect and the defendant owner has the right to construct the proposed building on the front lot line of its property.

Section 73-9 confers upon the proper local authorities of the municipality or any owner or tenant of real property in the same contiguous zoning district the right to enjoin the construction of a building in *violation* of the Zoning Ordinance. The building is not to be constructed in violation of the Zoning Ordinance of the City of Chicago

but in full accordance therewith pursuant to the granting of the front lot line building variance by the Zoning Board of Appeals. Accordingly the entire foundation of plaintiff's action based on §73-9 collapses.

One of the grounds of the motion to dismiss is,

> "3. As a matter of law, the Statute of the State of Illinois, Ill. Rev. Stat. (1955) c. 24, §73-9, does not grant to plaintiff the right to bring such action."

An affidavit in support of a motion to dismiss the complaint may be used for the purpose of discovering whether there is an issue of fact. *Farrall* v. *District of Columbia Amateur Athletic Union*, D.C. Cir., 1946, 153 F. 2d 647. The complaint here is grounded solely on the allegation that the construction of the building with the front line thereof within eleven feet of the south front street line of East Delaware Place is in violation of §18(b) of the Chicago Zoning Ordinance. The affidavit supporting the motion to dismiss specifically states that the Zoning Board of Appeals of Chicago has granted a variance pursuant to the Zoning Ordinance and the Zoning Enabling Act which authorizes the defendant owner to construct its building on the front lot line. The plaintiff, in this court, concedes that to be a fact. Accordingly such construction is not in violation of the Zoning Ordinance and there is no issuable fact to be tried.

The plaintiff contends that the District Court erred when it held, as it did, that it was without jurisdiction and that the injunction proceedings in the Superior Court of Cook County relating to the rear lot line and subsequent affirmance by the Appellate Court of Illinois, wherein it was held plaintiff has suffered or will suffer no injury by reason of the construction of the building in controversy, *222 East Chestnut Street Corporation* v. *LaSalle National Bank, et al.*, ... Ill. App. ....., decided January 21, 1958, barred the action below by *res judicata*. What we have heretofore said is dispositive of this appeal and although the reasons stated by the District Court for dismissal may be valid necessity for further discussion is thus obviated.

The District Court was correct in dismissing the complaint and the judgment is AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, March 6, 1958

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

222 East Chestnut Street Corp., a corporation of Delaware,
Plaintiff-Appellee,

No. 12144 vs.

La Salle National Bank, etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED WITH COSTS.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, April 22, 1958

Before
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

222 East Chestnut Corp., etc.,
Plaintiff-Appellee,
No. 12144 vs.
La Salle National Bank, etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by this Court that the petition for rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D.

The statutes involved (being excerpts from Ill. Rev. St. (1957)

Ch. 24, Art. 73-4. Enforcement Officers — Board of Appeals)

(a) In municipalities of 500,000 or more population, the regulations authorized by the Article may be varied in their application only by the board of appeals of the municipality, subject to the power of the corporate authorities to prohibit, in whole or in part, the granting of variations in respect to the classification, regulation and restriction of the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses. Variations shall be permitted by the board of appeals only when they are in harmony with the general purpose and intent of the regulations and only in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction or alteration of buildings or structures or the use of land. In its consideration of the standards of practical difficulties or particular hardship, the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the three conditions enumerated. The corporate authorities may provide general or specific rules implementing, but not inconsistent with, the rules herein provided to govern determinations of the board of appeals. A decision of the board of appeals shall not be subject to review, reversal or modification by the corporate authorities but shall be judicially reviewable under the provisions of Section 73-6.01.

* * *

(g) Every variation, whether made by the board of appeals directly, or by an ordinance after a hearing before the board of appeals, shall be accompanied by findings of fact specifying the reason or reasons for making the variation.

Ch. 24, Art. 73-6.01. Review)

All final administrative decisions of the board of appeals under this Article shall be subject to judicial review pursuant to the provisions of the "Administrative Review Act", approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 1 of the "Administrative Review Act." Added by act approved July 30, 1949. L. 1949, p. 568.

Ch. 24, Art. 73-9 (as amended June 24, 1953)
Proceedings to prevent violation)

"In case any building or structure is constructed, reconstructed, altered, repaired, converted or maintained, or any building, structure or land is used in violation of this article, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building or structure in question, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. When any such action is instituted by an owner or tenant, notice of such action shall be served upon the municipality at the time suit is begun, by serving a copy of the complaint on the chief executive officer of the municipality, no such action may be maintained until such notice has been given.

"In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes of this article.

"If a permanent injunction is decreed in any action or proceeding for a purpose mentioned in this section, the court in its decree may, in its discretion, allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such. As amended by act approved June 24, 1953, L. 1953, p. 431."

* * *

Ch. 110, sec. 264 et seq.
An Act in relation to judicial review of decisions administrative agencies.
Approved May 8, 1945.

Sec. 264. § 1. *Definitions*) For the purpose of this Act:

"Administrative Agency" means a person, body of persons, group, officer, board, bureau, commission, or department (other than a court, judge, justice of the peace or magistrate) of the State, or of any political subdivision thereof or municipal corporation therein, having power under law to make administrative decisions.

"Administrative decision" or "decision" means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency. In all cases in which a statute or a rule of the administrative agency requires or permits an application for a rehearing or other method of administrative review, and an application for such rehearing or review is made, no administrative decision

of such agency shall be final as to the party applying therefor until such rehearing or review is had or denied. The term "administrative decision" or "decision" does not mean or include rules, regulations, standards, or statements of policy of general application issued by an administrative agency to implement, interpret, or make specific the legislation enforced or administered by it unless such a rule, regulation, standard or statement of policy is involved in a proceeding before the agency and its applicability or validity is in issue in such proceeding, nor does it mean or include regulations concerning the internal management of the agency not affecting private rights or interests.

Sec. 265. § 2. *Scope of Act.*) This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.

Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision. If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of objections, protests, petition for hearing or application for administrative review within the time allowed by such Act, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter.

Office Supreme Court, U.S.
FILED
NOV 7 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 189

222 East Chestnut Street Corporation, a corporation of Delaware,
Petitioner,

vs.

LaSalle National Bank, a national banking association, not personally, but as Trustee under Trust Agreement dated December 28, 1954, and known as Trust No. 17365; Aaron B. Weiner, Mutual Properties Corporation, a corporation of Illinois; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; City of Chicago, a municipal corporation; Richard J. Daley, individually and as Mayor of the City of Chicago,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOSEPH F. ELWARD
111 W. Washington—Suite 1742
Chicago 2, Illinois
Attorney for 222 East Chestnut Street Corporation, Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 189

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222 East Chestnut Street Corporation, a corporation of Delaware,
Petitioner,

vs.

LaSalle National Bank, a national banking association, not personally, but as Trustee under Trust Agreement dated December 28, 1954, and known as Trust No. 17365; Aaron B. Weiner, Mutual Properties Corporation, a corporation of Illinois; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; City of Chicago, a municipal corporation; Richard J. Daley, individually and as Mayor of the City of Chicago,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice, and The Associate Justices of The Supreme Court of the United States:

1. 222 East Chestnut Street Corporation, a corporation of Delaware, petitioner, prays for a rehearing of the order of this Court heretofore entered on October 13, 1958, denying petition for certiorari therefore filed by petitioner to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on March 6, 1958.

2. Petitioner avers that the ground for said rehearing is that in the said petition for certiorari, it was not sufficiently disclosed that there was a conflict between the decision of the Court of Appeals for the Seventh Circuit here, and the decisions of the Courts of Appeals of other Circuits, in that said Courts of Appeals for other Circuits had decided that a motion to dismiss complaint could not be treated as a motion for summary judgment, without express notice to plaintiff and without giving plaintiff an opportunity to file counter-affidavit. The petition for certiorari was filed herein on July 19, 1958; subsequently thereto in the advance sheets dated August 11, 1958, Vol. 256 F. 2d No. 4, p. 589, there appeared a report of the decision in *Herron* v. *Herron*, 5th Cir., in which that Court hold that it was reversible error for the district court to allow defendant to raise defense of statute of limitations on motion which court treated as motion to dismiss and not as motion for summary judgment, since (1) it had been necesary to go outside of pleadings to prove application of the statute, (2) object of motion had been to try the main issue in case and effect of dismissal had been a decision on merits, and (3) complainant had had no notice of hearing and no opportunity to meet the issues. Judgment for defendant was reversed and the cause remanded. The court said:

> (p. 593) "It is clear that Rule 8(c) requires affirmative defenses to be pleaded, in order to prevent surprise. There is general agreement also, under Rule 9(f), that even the defenses of limitations or laches may be asserted by motion to dismiss for failure to state a claim—provided that the complaint shows affirmatively that the claim is barred." (citing cases and texts).

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"The 1946 amendment to Rule 12(b) requires a motion to dismiss to be treated as a motion for summary judgment, if the movant goes outside the pleadings to prove his affirmative defense. 'In short, the motion to dismiss is thereby converted into a motion for summary judgment.'" (citing authorities)

The court concluded:

* * *

(p. 594) "The rules safeguard a complainant from surprise. Rule 56 requires that the motion for a summary judgment be served 'at least 10 days before the time fixed for the hearing'. Rule 6(d) requires five days. Under Rule 56 'the pleadings, depositions, and admissions on file, with the affidavits, if any, [must] show that there is no genuine issue as to any material fact'. The amendment to Rule 12(b) provides that if matters outside the pleadings are to be considered and the motion converted to one for summary judgment, 'all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56'"

"In going into the disputed facts and in dismissing the suit, the trial judge went beyond the scope of his authority as defined in Rules 12(b) and 56.

The solid justice embedded in these two rules is well illustrated in the instant case. There may or may not have been a trust. But the complainant was entitled to a fair shake at proving the existence of a trust. Instead, without notice, without an opportunity to produce witnesses or to examine books and records of obvious bearing on the issue, without realizing what was happening to him, it happened: the case was disposed of on the merits. Rules 12(b) and 56 are to prevent just such an oddity. Complainant never had his day in court."

The court's language is an apt description of the plight of petitioner here. In the instant case petitioner "never had his day in court."

3. Because this clear-cut conflict of decision did not appear on the petition for certiorari because the opinion had not then been reported, petitioner submits that the rehearing should be allowed and certiorari granted, *Sanitary Refrigerator Co.* v. *Winters* (1920) 280 U.S. 30, 34, footnote 1; *Schriber-Schroth Co.* v. *Cleveland Trust Co.* (1938) 305 U.S. 47, 51.

Respectfully submitted.

JOSEPH F. ELWARD,
Attorney for 222 East Chestnut Street Corporation, petitioner.

CERTIFICATE OF COUNSEL.

I, Joseph F. Elward, hereby certify that the aforesaid Petition for Rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified, namely the conflict between the decision rendered in the instant case by the Seventh Circuit Court of Appeals allowing a motion to dismiss complaint to be treated as a motion for summary judgment without notice to plaintiff and without plaintiff having an opportunity to file counter-affidavit, and the decision rendered later by the Fifth Circuit Court of Appeals holding that such procedure constituted reversible error.

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JOSEPH F. ELWARD